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14 UNITED STATES BANKRUPTCY COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 In Re:	)	CASE NO. 19-30088 (DM)
)	
18 PG&E CORPORATION,	)	Chapter 11
)	
19 And	)	DEFENDANTS' OPPOSITION TO
	)	DEBTORS' MOTION TO REJECT
20 PACIFIC GAS AND ELECTRIC COMPANY,	)	VLAZAKIS CONTRACT AND
	)	GRANT RELATED RELIEF
21 Debtors,)	
	)	Date: February 11, 2020
<input type="checkbox"/> Affects PG&E Corporation	)	Time: 10:00 a.m.
<input checked="" type="checkbox"/> Affects Pacific Gas and Electric Company	)	Dept.: 17
<input type="checkbox"/> Affects Both Debtors	)	450 Golden Gate Ave
	)	San Francisco, CA 94102
)	Judge: Dennis Montali
<i>*All papers shall be filed in the Lead Case, no. 19-30088 (DM)</i>)	

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1 seeks injunctive relief to tear down the common wall which will cause the Vlazakis' building to
2 collapse. Significantly, these adjoining structures have been in place for more than 50 years.

3 The Vlazakis family sought relief from the bankruptcy stay to file a compulsory state law
4 cross-complaint in the action instituted by PG & E. The Vlazakis defendants' motion for relief
5 from automatic stay was argued on December 17, 2019 before this court. Included in the proposed
6 cross-complaint are contract causes of action, by which the Vlazakis seek to establish their
7 *contractual* rights to the common wall for the continued support of their building at 751 Third
8 Street. If proven, the Vlazakis contract claims would bar PG & E's claim for damages and
9 injunctive relief based on trespass and nuisance.

10 PG & E opposed the motion for relief from stay only as to the contract claims included within
11 the Vlazakis' proposed cross-complaint stating—for the very first time—that it intended to reject
12 the Contract.¹ The instant motion followed.

13 As set forth more fully herein, the Contract cannot be rejected because it is not executory since
14 the Vlazakis have performed all material obligations required under the agreement. *Unsecured*
15 *Creditors' Comm. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.)*, 139 F.3d 702,
16 705, 706 (9th Cir. 1998) (en banc). Further, even if the Contract were deemed executory, which it
17 is not, the rejection sought here—one year after PG & E's bankruptcy petition—is being requested
18 in bad faith. PG & E is not seeking to reject the contract as an exercise of business judgment,
19 rather it is a litigation strategy to support PG & E's effort for affirmative relief in the state court
20 action. *See Agarwal v. Pomona Valley Med. Grp., Inc. (In re Pomona Valley Med. Grp., Inc.)*, 476
21 F.3d 665, 670 (bad faith is cause to refuse request to reject contract). Here, PG & E seeks to use
22 bankruptcy law to strip the Vlazakis of their ability to establish contractual rights to use of the
23 common wall, which if proven, would bar PG & E's state court action.

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¹ PG & E attempts to obfuscate the issues presented by claiming there is a distinction between the proposed claims
contained in the cross-complaint by labelling them either "Contract" claims or "Title" Claims; this is a distinction
without a difference. All claims seek to establish legal and/or equitable rights to use of the wall.

II. FACTUAL BACKGROUND

A. The PG & E and Vlazakis Properties

In 2015, plaintiff, PG & E purchased property in Oakland, California, with street addresses of 205-209 Brush Street (parcel APN 001-0111-005) (Exhibits 1 attached to the Declaration of Ronald F. Berestka)² PG & E alleges that it purchased this property in 2015 in order to construct a natural gas pipeline substation. (Exhibit 1) PG & E's "L" shaped property that takes up more than $\frac{3}{4}$ of a city block and is adjacent to property owned by the Vlazakis, which have street addresses of 225-229 Brush Street and 751 Third Street (APN 001-0111-001 and 001-0111-002). (Exh. 1 Complaint with attached Exh. A to Complaint; Berestka Decl., ¶8 [clarifying PG & E property borders in Exh.1]; Declaration of Maria Barbis ¶2)

Located on PG & E's property is a long-standing brick building that is fronted on Third Street roughly to the north. (M. Barbis Decl., ¶3) The eastern-facing wall of PG & E's brick building runs along the property line with the Vlazakis' property and is adjacent to the Vlazakis' 751 Third Street building. (M. Barbis Decl., ¶3) The 751 Third Street building has a series of three vertical support I-beams, all on the Vlazakis' property, which are bolted to the brick wall of PG & E's building, and act to support the Vlazakis' building. (Exh. 1) These braces have been in place for more than 50 years, and pre-date the Vlazakis' parents purchase of the property in 1960. (M. Barbis Decl., ¶3)

B. PG & E and Vlazakis Enter a Contract to Give the Vlazakis Ownership of the Common Wall and Adjacent Strip of Land

At some point in time, PG & E determined that it would be necessary to demolish its brick building in order to construct its substation. Given that the east-facing wall of the brick building acts to support the Vlazakis' 751 Third Street building, PG & E approached the Vlazakis and proposed a solution which essentially required a lot line adjustment extending the Vlazakis' property to include the entire subject brick wall, with PG & E agreeing to shore up that wall, at PG & E's sole expense, so that it would continue to support the Vlazakis' 751 Third Street

² Hereinafter all references to numerical Exhibits shall be to those attached to Mr. Berestka's declaration unless otherwise noted.

1 building. (Exh. 1 Complaint with Contract attached thereto as Exhibit B; Exh. 3) This agreement
2 was reduced to a written contract that was signed by PG & E and the Vlazakis defendants. (*Id.*)

3 **C. The Vlazakis Perform All of Their Material Obligations Under the Contract**

4 After the Contract was entered, the Vlazakis performed all material obligations required of
5 them under the Contract. (Declaration of George Vlazakis ¶¶5-9; M. Barbis Decl. ¶4, Exhibit 4
6 attached thereto) The Vlazakis' obligations under the agreement were largely ministerial in nature
7 (e.g., allow access to the premises, sign off on permit applications, and generally cooperate), and
8 required no significant affirmative conduct—indeed there was no reason for the Vlazakis' to not
9 cooperate as the work was being performed to benefit their property at no cost to them. (Exh. 3)
10 The specific Contract terms relating to the obligations of the Vlazakis are contained in
11 paragraphs 1, 3, 5 and 8. (Exh. 3; Motion to Reject Contract pp.10-11)

12 Paragraph 1 of the Contract required the Vlazakis to provide written “documentation/deeds
13 to verify how the title was acquired” for their adjoining lots. (Exh. 3, para. 1) The Vlazakis
14 complied with this term of the contract by providing the required documents to PG & E's Project
15 Manager from Craig Communications, Evelyn Soto, on November 20, 2017, with Ms. Soto
16 acknowledging that this was “the grant deed that PG & E needed”. (M. Barbis Decl. ¶4, Exhibit 4
17 attached thereto).³

18 The Vlazakis' also owed obligations under the Contract in paragraphs 3 and 5, which required
19 the Vlazakis to sign off on the application for the lot line adjustment necessary for PG & E to
20 complete its work and to “cooperate” by signing any documentation needed for approvals from the
21 City of Oakland and the CPUC. (Exh. 3, para. 3 and 5). The Vlazakis did so and the design to
22 shore the wall and the lot line adjustment were ultimately approved by the City of Oakland.⁴ (B.
23 Garber Declaration in Support of Motion to Reject Contract ¶5 referencing
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26 ³ Relying on the declaration of Mr. Garber, PG & E claims that the Vlazakis did not deliver these required
27 documents, however this is simply untrue, and Mr. Garber has no foundation for making such a statement. (Compare
Garber Decl. ¶15 with M. Barbis Decl., ¶4, Exh. 4 attached thereto)

28 ⁴ It is important to note that the Contract did not specify how PG & E would shore up the common wall, only that is
was PG & E's responsibility to do so. (Exh. 3, Contract)

1 Exhibit C thereto entitled “Garber Supplemental Declaration” ¶5; Exh 5, City of Oakland record
2 history for PG & E’s property at 205 Brush Street in Oakland indicating lot line adjustment
3 approval; G. Vlazakis Decl., ¶4, 5, 8, 9). PG & E presents no evidence that the Vlazakis either
4 failed to cooperate or that further specific cooperation was required of them under these clauses.
5 (See generally Motion to Reject Contract)

6 Finally, paragraph 8 required the Vlazakis to “agree” to provide access to their premises so
7 that the construction work could be accomplished. (Exh 3, para. 8). Not only did the Vlazakis
8 agree to allow access, they in fact did allow repeated and virtually unfettered access to their
9 premises, including to the interior of 751 Third Street, to examine the wall at issue, in compliance
10 with the terms of the Contract. (G. Vlazakis Decl., ¶¶6, 7). In fact, PG & E had its own key to
11 allow PG & E to access an open yard owned by the Vlazakis to the rear of and adjacent to 751
12 Third Street to facilitate PG & E’s work. (G. Vlazakis Decl., ¶6.) PG & E offers no evidence that
13 the Vlazakis did not allow access at any time.

14 Finally, contrary to PG & E’s assertion, the Vlazakis were not required to bring their
15 property into ADA compliance under the approved plans, and PG & E’s suggestion that this was
16 required as part of the plan is disingenuous. (G. Vlazakis Decl., ¶¶8, 9). PG & E offers no
17 evidence that the design approved by the City of Oakland required ADA compliance as the revised
18 design was not conditioned on ADA compliance.⁵ (See generally Motion to Reject Contract; G.
19 Vlazakis Decl., ¶¶8, 9). Again, under the Contract, the Vlazakis had no further material
20 obligations to perform. (Exh. 3; G. Vlazakis Decl., ¶¶5-9).

21 **D. PG & E Seeks to Avoid Contract Obligations**

22 At some point in time after PG & E had obtained approval of the lot line adjustment and its
23 revised design to shore the common wall under the Contract, PG & E decided that its own shoring
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26 ⁵ PG & E states that the City of Oakland rejected its *first* design proposal, which they allege required ADA compliance
27 by the Vlazakis. Aside from the fact that this is inadmissible hearsay, PG & E fails to mention that the *revised*
28 design that PG & E submitted was not conditioned on ADA compliance and it was in fact approved by the City of
Oakland. (Garber Declaration attached to PG & E Motion to Reject Contract, ¶5 referencing Exhibit C thereto entitled
“Garber Supplemental Declaration” ¶5; G. Vlazakis Decl. ¶¶8, 9)

1 design plan would not suit its needs and sought to back out of the contract.⁶ PG & E claims that it
2 failed to honor the agreement because it miscalculated the amount of space that it would need to
3 construct the vault to house its natural gas substation, i.e., PG & E either did not account for size
4 of, or miscalculated the space necessary for, the substation vault or the footing required to shore up
5 the wall that supports the Vlazakis' building. (Berestka Declaration ¶10)

6 PG & E offers no explanation as to why it could not have adjusted its gas substation design to
7 use the remainder of its rather large lot—three quarters of a city block—to complete the substation
8 project and to accommodate structural work on the wall, which was the primary purpose of the
9 Contract to begin with. Instead, PG & E merely states that it was “infeasible”, with no further
10 explanation.

11 **E. PG & E's Lawsuit in California State Court**

12 On June 4, 2019, PG & E sued the Vlazakis family defendants alleging that the support I-
13 beams attached to the brick wall constituted a nuisance and a trespass, and PG & E sought
14 injunctive relief to permit the demolition of the common party brick wall, which would cause the
15 collapse of the Vlazakis' 751 Third Street building. (Exh. 1)

16 The Vlazakis answered plaintiff's complaint denying PG & E's claims and asserting various
17 affirmative defenses. (Exh. 2) In addition, the Vlazakis assert legal and equitable rights to
18 continued use of the common wall in a proposed cross-complaint that contains several contract-
19 based causes of action. (Exh. 6) Through these contract-based causes of action the Vlazakis
20 seek to establish a legal right to continued use of the wall. Of critical importance is the fact that if
21 the Vlazakis succeed on the contract theory, their contract-based rights would effectively defeat
22 PG & E's nuisance and trespass claims. Accordingly, the contract-based claims are not solely to
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24 ⁶ PG & E attempts to paint itself as the “good guy” going beyond the call of duty due to its submission of revised plans
25 for the shoring of the wall after the first plans were rejected (Motion to Reject Contract, p.6 fn.1), however the first set
26 of plans did not comply with the contract requirements. (Exh. 3 requiring lot line adjustment) PG & E admits that its
27 original design plan would have required “fasteners [] would have crossed property lines. The City of Oakland refused
28 to issue a permit...because the wall bracing system” was impermissibly designed to include encroachments that cross
property lines. (PG & E Motion to Reject Contract, p.8:3-6). Given that the Contract required that PG & E deed the
wall to the Vlazakis along with a 4-foot wide 50-foot long strip of land on the common border, no cross-border
fasteners would be required in a design that complied with the Contract. Accordingly, the requirement for a new set of
shoring plans was due to PG & E's error, not some laudable or extraordinary effort on its part.

1 recover damages or to force performance by PG & E, rather if successful they provide a complete
2 defense to PG & E's state court action because they would be entitled to continued use the wall.

3 Significantly, the Vlazakis will be entitled to a jury trial on the breach of contract cause of
4 action, something PG & E is looking to avoid, as this would vacate the current bench trial set for
5 May 13, 2020.

6 III. LEGAL DISCUSSION

7 A. The Contract is Non-Executory and Cannot Be Rejected as the Vlazakis Have 8 Performed All Material Obligations

9 The question whether a particular contract is "executory" under § 365 is a question of fact,
10 *Unsecured Creditors' Comm. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.)*, 139
11 F.3d 702, 706 n.13 (9th Cir. 1998) (en banc). The Ninth Circuit has adopted Professor
12 Countryman's definition of an executory contract: "a contract under which the obligation of both
13 the bankrupt and the other party to the contract are so far unperformed that the failure of either to
14 complete performance would constitute a material breach excusing the performance of the other."
15 Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973);
16 see *In re Helms Constr.*, 139 F.3d at 705 ("An executory contract is one 'on which performance
17 remains due to some extent on both sides.'"). The materiality of the parties' remaining obligations
18 depends on whether, under applicable state law, one party's nonperformance would excuse the
19 other party's obligation to perform. *Hall v. Perry (In re Cochise Coll. Park, Inc.)*, 703 F.2d 1339,
20 1348 n.4 (9th Cir. 1983).

21 Whether a contract is "executory" is a question of fact, both under the Bankruptcy Code, and
22 California law. *In re Helms Constr.*, 139 F.3d at 706 n.13. Where the bankruptcy court, such as
23 here, is making this decision in ruling in the context of a stay relief motion, the bankruptcy courts
24 refrain from making merits decisions, including the validity of a contract. *Johnson v. Righetti (In*
25 *re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985) ("The validity of the claim or contract
26 underlying the claim is not litigated during the hearing.")).

1 The Court in analyzing whether a contract is executory

2 Look[s] to outstanding obligations at the time the petition for relief is filed and ask
3 whether both sides must still perform. The question thus becomes: At the time of
4 filing, does each party have something it must do to avoid materially breaching the
contract?

5 *See In re Helms Constr.*, 139 F.3d at 706.

6 State law controls the definition of "material" terms under the contract (i.e., when failure of
7 performance would constitute a material breach). *Hall v. Perry (In re Cochise College Park, Inc.)*,
8 703 F.2d 1339, 1348 (9th Cir. 1983); *In re Aslan*, 909 F.2d 367, 369 (9th Cir. 1990). Under
9 California law, failure to fully perform an obligation under a contract results in a material breach
10 "if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of
11 the contract." *Aslan*, 909 F.2d at 370 (citations omitted).

12 Contrary to PG & E's argument here, the Vlazakis had completed all material terms of the
13 agreement and merely awaited performance by PG & E, pursuant to PG & E's own plans and
14 proposals as set forth in the Contract. (Exhs. 3, 5; G. Vlazakis Decl., ¶¶5-9; M. Barbis Decl., ¶4,
15 Exh. 4 attached thereto). An examination of the Contract terms relating to the obligations of the
16 Vlazakis and the evidence of their satisfaction of these obligations is dispositive here.

17 Paragraph 1 of the Contract required the Vlazakis to provide written "documentation/deeds
18 to verify how the title was acquired" for their adjoining lots. (Exh. 3, para. 1) The Vlazakis
19 complied with this term of the contract by providing the required documents to PG & E
20 representatives on November 20, 2017 (M. Barbis Decl. ¶4, Exh. 4 attached thereto).

21 The Vlazakis' next obligation under the Contract is contained in paragraphs 3 and 5, which
22 required the Vlazakis to sign off on the application for the lot line adjustment necessary and the
23 permit application for shoring of the wall. (Exh. 3, paras. 3, 5). This too was completed by the
24 Vlazakis and the lot line adjustment and the plans for shoring up the wall were approved by the
25 City of Oakland. (Exh. 5; G. Vlazakis Decl., ¶¶ 8, 9; B. Garber Decl. in Support of Motion to
26 Reject Contract, ¶10, and Exh. C attached thereto entitled "Garber Supplemental Declaration" ¶5).
27 PG & E fails to offer any evidence that the Vlazakis either failed to cooperate or that further
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1 specific cooperation was even required of them *under the Contract*. (Exh. 3; G. Vlazakis Decl.
2 ¶¶4-9).

3 Finally, paragraph 8 required the Vlazakis to “agree” to provide access to their premises so
4 that the construction work could be accomplished. (Exh. 3, para. 8). Not only did the Vlazakis
5 agree to allow access, they in fact did allow repeated and virtually unfettered access to the
6 premises at 751 Third Street, including to the interior of the building to examine the wall at issue,
7 in compliance with the terms of the Contract. (G. Vlazakis ¶¶5, 6, 7)

8 Noticeably absent from PG & E’s motion to reject the contract is any evidence that the
9 Vlazakis owed any material obligations to complete performance under the Contract. Indeed, no
10 evidence is presented that additional permits or approvals were required that necessitated the
11 Vlazakis consent or approval and PG & E offers no evidence of any lack of cooperation
12 regarding any terms of the Contract itself. Contrary to PG & E’s argument, the Vlazakis had no
13 further material obligations to perform.

14 PG & E argues that if it had continuing obligations, so too did the Vlazakis because the
15 Vlazakis would have to continue to grant access to their premises. (Debtor’s Motion pp.10-11)
16 This argument is specious because PG & E’s continuing obligations under the Contract do not
17 require further material obligations of the Vlazakis. In effect, PG & E’s attempt to set up a straw
18 man to knock down fails as its argument is a non sequitur.

19 As set forth above, the Vlazakis provided all required documents, signed off on all required
20 permit applications, and provided unfettered access to the premises—even going to far as to allow
21 PG & E its own key to access portions of the adjacent yard at will. (G. Vlazakis Decl. ¶¶5-9)
22 Essentially all that is left for the Vlazakis to do is to not interfere with PG & E’s work. If this
23 constitutes a continuing material obligation, then no contract could ever be deemed non-executory.

24 PG & E also complains that the Vlazakis were not cooperative, suggesting that this was an
25 impediment to performance of the Contract and that such conduct would have materially thwarted
26 the Contract, making it executory. This is misleading at best as the alleged “unwillingness” to
27 cooperate did not relate to the Vlazakis’ performance under the Contract, rather it describes the
28 Vlazakis unwillingness to agree to PG & E’s demands *after* PG & E refused to honor the

1 agreement and *after* the City of Oakland had already approved the permits of the shoring project
2 and the lot line adjustment.⁷ (See Motion to Reject Contract p.8:21-27; B. Garber Decl. ¶¶11, 12
3 (referencing *post* City approval conduct). It was only then, when PG & E made alternative
4 proposals unrelated to the Contract that would significantly burden the Vlzakises, that the
5 Vlzakises declined to agree.

6 The claimed remaining obligations amount to mere perfunctory consent to allow PG & E to
7 perform the work it agreed to perform under the Contract; the Vlzakises had no continuing
8 obligations of significance or materiality. Moreover, PG & E's argument is nonsensical,
9 considering that the Vlzakises cooperated pursuant to the terms of the Contract throughout, and
10 there is no indication that the Vlzakises would somehow suddenly act against their own interest to
11 sabotage the project by refusing to let PG & E improve the Vlzakis property at no cost to the
12 Vlzakises. Absurd hypothetical "what-ifs" hardly constitute evidence in this instance.

13 In short, the evidence here is irrefutable that Vlzakises performed all of their obligations
14 under the Contract and no evidence is offered nor would it be reasonable, much less plausible, that
15 the Vlzakises would somehow interfere with PG & E completing its work. Simply put, PG & E
16 has failed to identify any material obligation yet to be performed by the Vlzakises, hence the
17 contract is non-executory—the only remaining material obligations under the Contract were those
18 assigned to PG & E. Under the Countryman standard adopted by the 9th Circuit, this renders the
19 Contract non-executory and prevents its rejection under 11 U.S.C. §365(a).

20 **B. PG & E's Effort to Reject the Contract is a Bad Faith Litigation Strategy to Win its**
21 **Case in the State Court by Stripping the Vlzakises of Contractual Rights that Would**
22 **Defeat PG & E's State Court Claim**

23 Even if we assume that the contract was an executory contract—which it is not—it may only
24 be rejected if the proponent satisfies the business judgment test. *In re Chi-Feng Huang*, 23 B.R.
25 798, 800 (Bankr. 9th Cir. 1982). The primary issue is whether the rejection of the contract would
26 benefit general unsecured creditors. E.g., *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir.
27 1993), cert. dismissed, 114 S. Ct. 1418 (1994); *In re Kong*, 162 B.R. 86, 94 (Bankr. E.D.N.Y.

28 ⁷ E.g., PG & E proposed purchasing the Vlzakis' property so that it could tear the wall down *after* PG & E sought to
back out of the Contract.

1 1993); *In re Lawson*, 146 B.R. 663, 664-65 (Bankr. E.D. Va. 1992); *In re Audra-John Corp.*, 140
2 B.R. 752, 755 (Bankr. D. Minn. 1992). Other factors that the court may consider include whether
3 (a) the contract burdens the estate financially; (b) rejection would result in a large claim against the
4 estate; (c) the debtor showed real economic benefit resulting from the rejection; and (d) upon
5 balancing the equities, rejection will do more harm to the other party to the contract than to the
6 debtor if not rejected. "Generally, absent a showing of bad faith, or an abuse of business discretion,
7 the debtor's business judgment will not be altered." *In re G Survivor Corp.*, 171 B.R. 755, 757-58
8 (Bankr. S.D.N.Y. 1994) Bad faith by the debtor in seeking to reject a contract is grounds to deny
9 such a request. *See Agarwal v. Pomona Valley Med. Grp., Inc. (In re Pomona Valley Med. Grp.,*
10 *Inc.)*, 476 F.3d 665, 670 (citing *Lubrizol Enters., Inc. v. Richmond Metal Finishes*, 756 F.2d 1043,
11 1047 (4th Cir. 1985).)

12 The issue before this court is not addressed in any of the case law discussed in the briefing as it
13 is factually unique. The question presented is whether a debtor who sues a party in state court can
14 reject a contract in bankruptcy to prevent the state party defendant from asserting contractual rights
15 that would, if proven, defeat the debtor's state court lawsuit. The answer to this question should be
16 an unequivocal no, as such conduct would be by definition, bad faith, and manifestly unjust.

17 Here, PG & E's efforts to reject the subject Contract are being undertaken in bad faith as a
18 state court litigation strategy, in order to deprive the Vlzakises of legal remedies that would defeat
19 PG & E's state law claims and to avoid a jury trial in the ongoing state court action. It is important
20 to note that PG & E made no effort to reject the Contract until it was faced with the Vlzakises'
21 motion for relief from stay to assert the contract claims, despite filing its petition to reorganize one
22 year ago, and despite being aware of the Vlzakises' potential contract claims which could bar
23 PG & E's state court action since at least August of 2019. (Exh. 7, Hearing Transcript for
24 Preliminary Injunction, pp.12:18-13:18; Berestka Decl. ¶7). The existence of the contract at issue
25 was well-known, indeed the agreement was and is at the center of the dispute giving rise to
26 PG & E's state court action—namely whether the Vlzakises possess any right to use of the
27 subject wall, in law or equity, and more specifically here, pursuant to contract.

28

1 PG & E sat on its rights and made no effort to reject the contract for nearly a year until the
2 Vlzakises sought to defend themselves by asserting that PG & E breached the Contract, which if
3 proven, would defeat PG & E's state court claims. This motion to reject the contract is nothing
4 short of a bad faith effort by PG & E to deprive the Vlzakises of their property rights under both
5 state law and the Fourteenth Amendment to the United States Constitution. If the issue were
6 merely to avoid any contractual obligations for the benefit of the debtor, this motion would have
7 been filed long ago. Instead it is now being used as a sword by PG & E to advance its lawsuit in
8 state court and to hamstring the Vlzakises efforts to defend themselves in that action.

9 Next, PG & E again offers no evidence as to how rejection of the Contract would benefit
10 general unsecured creditors, it fails to offer evidence of the purported financial burden, it fails to
11 explain the size of the claim against it, and PG & E provides no evidence of the economic benefit
12 of the rejection. PG & E speaks only in generalities and quantifies nothing in terms of burden to it,
13 while upon examination of the actual facts reveals that the equities heavily favor the Vlzakises.

14 The Vlzakises are mere owners of a building that contained I-beams prior to their family's
15 purchase of the property in 1960—the Vlzakises did not create the condition that PG & E
16 complains of here. (M. Barbis Decl. ¶3) The beams were installed over 50-60 years ago, likely by
17 a common owner of the two properties, or with the knowledge and/or consent of the prior owner of
18 the current PG & E property, as one cannot imagine a situation where these steel I-beams were
19 brought onto what is now the Vlzakis property and then bolted to the common brick wall without
20 the adjacent neighbor being aware. PG & E offers no evidence that the Vlzakises in any way
21 have unclean hands with regard to the I-beams and the wall—which was an existing condition in
22 1960 when the family purchased the building. PG & E in effect came to the claimed nuisance, and
23 it is PG & E who seeks to change the status quo by destroying the Vlzakis building. While
24 PG & E's intentions in constructing the substation may be good, good intentions are not evidence
25 of burden, and they do not destroy the Vlzakises claimed right to use the wall to support the
26 751 Third Street building, much less warrant destruction of this family owned structure.

1 Finally, PG & E fails to explain exactly why it cannot complete the project under the Contract
2 and also construct its substation.⁸ Instead PG & E again argues in generalities that the substation
3 project would become infeasible *as designed*. (Motion to Reject Contract, p.8:15-20). Nowhere
4 does PG & E indicate that it considered, much less undertook, any effort to alter its design in order
5 to allow both the shoring of the wall under the Contract and the construction of the substation in
6 order to achieve the common goals of safety for this project for the benefit of the parties' interests
7 as well as those of the neighboring properties. Significantly, PG & E offers no evidence as to any
8 possible cost or burden to PG & E in altering its substation plans; the only evidence of burden
9 before this court is that of the Vlazakis family, which as set forth herein, is substantial.

10 **C. Relief From Stay as to Contract Claims is Warranted as Claims Are Compulsory, and**
11 **Necessary to a Determination of the Trespass and Nuisance Claims Raised by PG & E**
12 **in its State Court Action**

13 “Cause” warranting relief from the automatic stay is an intentionally broad and flexible
14 concept, made so in order to permit courts to respond in equity to inherently fact-sensitive
15 situations. *In re Sentry Park Ltd.*, 87 B.R. 427, 430 (BK. W.D. Tex. 1988). In determining
16 whether “cause” exists to terminate and vacate the automatic stay requires an inquiry into the
17 totality of the facts and circumstances of a particular case and a balancing of the equities between
18 the parties. *In re Barrows*, 15 B.R. 338, 341 (Bankr. M.D. Pa. 1981) (“[a]s a court of equity, the
19 Bankruptcy Court must consider the impact of the stay on the parties and the ‘balance of hurt’ in
20 fashioning relief”). A judge may determine cause on a case-by-case basis, and may grant relief
21 from stay on any basis, including but not limited to statutory causes. *In re Tucson Estates, Inc.*,
22 912 F.2d 1162 (9th Cir. 1990); *In re Santa Clara County Fair Ass’n*, 180 B.R. 564 (B.A.P. 9th
23 Cir. (Cal.) 1995).

24 If ever a case presented “cause: for relief from stay, this is it. Without relief from stay
25 PG & E will be permitted to run roughshod over the Vlazakis in PG & E’s state court lawsuit,
26

27 ⁸ PG & E withheld material information from the Vlazakis about PG & E own error in PG & E’s design and layout.
28 PG & E had ample time in order to correct its own mistake in the design of its own gas project, but never made the effort.

1 depriving the Vlazakis of their right to have a judicial determination as to whether they possess
2 contractual rights that defeat PG & E's claims.

3 PG & E does not dispute the fact that the entire proposed cross-complaint, including the
4 contract claims, are compulsory and these contract claims are inextricably intertwined with the
5 issues tendered by PG & E's complaint in the state court action. By way of example, should the
6 Vlazakis succeed on the proposed contract claims, the Vlazakis would either take ownership of
7 the wall at issue (via specific performance), which would bar PG & E's claim for nuisance and
8 trespass damages, and request for injunctive relief or, due to PG & E's breach of contract, the
9 Vlazakis would be entitled to damages *and* PG & E would be prohibited from recovering
10 damages for nuisance or trespass, or from obtaining injunctive relief, because the Vlazakis
11 would have established contractual rights to the wall. Excising the contract claims for supposed
12 later resolution in the bankruptcy court as PG & E suggests would rob the Vlazakis of these
13 crucial affirmative claims, which if proven, would defeat PG & E's state court lawsuit.

14 In effect, refusal to lift the stay as to the contract claims, as noted above, deprives the
15 Vlazakis of *non-monetary* relief and other *adjudicative benefits* such as estoppel, that would
16 otherwise not affect the Debtor's estate. For example, if the Vlazakis did succeed in the state
17 court action on their contract claims as noted, PG & E's right to injunctive relief and damages
18 would be defeated as a matter of law. While the bankruptcy court may have concerns and/or
19 possibly intervene to prevent actual collection of damages against PG & E, or to prevent the
20 enforcement of an order of specific performance, the Vlazakis are unaware of any authority that
21 would prohibit them from asserting their success on the contract claims via estoppel as a bar to
22 PG & E's trespass and nuisance causes of action which would have no effect on the bankruptcy
23 estate.

24 PG & E brought the state court action, dragging the Vlazakis into court. Requiring PG & E
25 to litigate the contract claims is no more burdensome than requiring PG & E to litigate the
26 Vlazakis affirmative defenses. Indeed, the contract claims are akin to affirmative defenses for if
27 proven, PG & E's claims would be barred. Excising the contract claims therefore would then have
28 the same effect as this Court stripping the Vlazakis of a dispositive legal defense.

1 If PG & E wants to pursue the state court action, it then must litigate the Vlazakis state court
2 contract claims simultaneously or agree to stay the state court action until the bankruptcy is
3 resolved. There is no other remedy to this situation, as PG & E's proposed course of action,
4 namely excising the contract claims from the state court action will deprive the Vlazakis of
5 substantive legal rights as well as due process rights under both state and federal law.

6 **D. Bankruptcy Stay Inapplicable to Proposed Cross-Complaint in a Lawsuit Filed by PG**
7 **& E After its Bankruptcy Petition**

8 Title 11 USC 362 (a) states that the filing of a bankruptcy petition operates as an automatic
9 stay of:

10 (1) the commencement or continuation, including the issuance or employment
11 of process, of a judicial, administrative, or other action or proceeding against the
12 debtor that was or could have been commenced before the commencement of the
13 case under this title, or to recover a claim against the debtor that arose before the
commencement of the case under this title;

14 Simply put, the stay does not apply to the present action and the proposed cross-complaint.

15 Here, PG & E filed its bankruptcy petition on January 29, 2019. Four months later, on June 4,
16 2019, PG & E initiated suit against the Vlazakis in California state court. The Vlazakis now
17 seek to file a compulsory cross-complaint against PG & E in the state court action filed after
18 PG & E declared bankruptcy. Clearly the Vlazakis did not commence or continue an action
19 before PG & E's bankruptcy petition.

20 First, prior to PG & E initiating its state court lawsuit—months after it had petitioned for
21 bankruptcy—the Vlazakis had no reason to sue PG & E. There simply was no reason to assert
22 the claims contained in the cross-complaint until after PG & E had declared bankruptcy. There
23 was no reason to assert a breach of contract claim, or the other causes of action now contained in
24 the proposed cross-complaint given that these potential claims were not factually ripe—the
25 Vlazakis had no reason to file suit until events developed indicating that PG & E was wrongly
26 breaching the contract and that PG & E may have engaged in bad faith conduct to support its claim
27 that the agreement was not feasible, which in this instance, was the result of PG & E's own failure
28 to properly calculate the space required for its substation. Certainly, it is not the policy of our

1 judicial system to encourage that lawsuits be filed before one has determined actual cause to assert
2 a claim.

3 Second, there was no complaint against the Vlzakises by PG & E to which they could have
4 filed a cross-complaint (which by definition, requires a complaint in the first instance), until PG &
5 E's state court lawsuit which, as shown above, was several months post-bankruptcy petition.

6 In sum, the Vlzakis' claims in its proposed cross-complaint were not commenced before
7 PG & E's bankruptcy petition, nor "could" they have been. Anyone "could" file a lawsuit at any
8 time, even without good cause, or a good faith belief in a claim. Here, the cause to file a claim
9 against PG & E was not apparent and the Vlzakises had no good faith basis to file a lawsuit until
10 after the bankruptcy petition. As such, the automatic stay is inapplicable.

11 **IV. CONCLUSION**

12 PG & E'S Motion to Reject Contract should be denied. First the contract is non executory as
13 the Vlzakises have performed all material terms under the agreement, and PG & E fails to offer
14 any evidence of further material obligations required to be met. Further, PG & E is seeking to
15 reject the contract in bad faith as a litigation strategy in the state court action to prevent the
16 Vlzakises from establishing their contractual right to use of the wall which would defeat
17 PG & E's state court action; in effect PG & E is attempting to strip the Vlzakises of the right to
18 defend themselves. In addition, PG & E has failed to offer any evidence as to what if any burden it
19 would suffer from simply altering its substation plans to allow for both the shoring of the common
20 wall and the construction of its substation.

21 For the reasons stated herein, the Vlzakises are entitled to relief from the bankruptcy stay
22 in its entirety. All causes of action in their proposed cross-complaint are critical to a fair and just
23 determination as to whether they are entitled to continued use of the wall, whether that right be in
24 equity or in law, and whether that be pursuant to an easement or a contractual right.

1 Again, PG & E picked this fight by filing a lawsuit in state court, and it now seeks to abuse it
2 bankrupt status to obtain affirmative relief against the Vlazakis while depriving the Vlazakis
3 of due process.

4 DATED: January 20, 2020

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